City v. L.371, SSEU, 35 OCB 38 (BCB 1985) [Decision No. B-38-85 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK, DECISION NO. B-38-85

Petitioner, DOCKET NO. BCB-741-84 (A-1991-84)

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371, AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

On October 22, 1984, the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Social Service Employees Union, Local 371, AFSCME (hereinafter "the Union" or "SSEU") on October 12, 1984. SSEU filed an answer on December 27, 1984, to which the City replied on January 14, 1985.

The SSEU's request for arbitration was submitted on behalf of six named grievants, and "all other similarly situated." The Union alleges that the City has violated certain specified sections of the Human Resources Administration

Non-Managerial Employee Performance Evaluation (Manual ("HRA Manual") and the New York City Department of Personnel Agency Guide to Performance Evaluation for Sub-Managerial Positions ("DOP Guide") by the implementation of Bureau of Child Support ("BCS") Informationals 18/83 and 12/84 (which revised 18/83). These informationals, which were promulgated on November 3, 1983 and June 8, 1984, respectively, set forth evaluation ratings based on numerical standards to be used in evaluating BCS investigators/caseworkers beginning with the period July 1, 1983 to June 30, 1984. These standards were also to be used by supervisors in preparing interim evaluations due January 1984. The Union contends that, inasmuch as this action may result in discipline of employees under Article V, Section I(B) of the Agreement, it falls within the definition of a grievance set forth in Article VI, Section l(B). Article V, Section l(B) of the Agreement states:

> Employees who work at less than acceptable levels of performance may be subject to disciplinary measures in accordance with applicable law.[1]

[1] It should also be noted that Article V, Section l(A) recognizes that the City has the right to establish and/ or revise performance standards for measuring employees' performance. It also requires that the City give the Union prior notice of the establishment and/or revision of performance standards.

Article VI, Section 1 defines a grievance as, inter alia:

> (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the Grievance Procedure or arbitration; ...

As a remedy, the Union requests that Informational 12/84 be withdrawn and that any evaluations based on the numerical standards contained in Informationals 18/83 and 12/84 be rescinded.

Positions of the Parties

Union's Position

The Union's answer alleges, generally, that the implementation of the Informationals violates the HRA Manuals and DOP Guide on three grounds:

> - in most cases employees were rated solely on the basis of these quantitative standards of which the employees were not appraised [sic] at the beginning of their evaluation period;

> - that the standards used to evaluate [employees] were not approved by the Agency in the manner required by the Manuals;
>
> - that the standards used to evaluate the employees were not indicative of a satisfactory level of performance and-were substantially affected by factors outside the employees' control.

The Union takes the position that the HRA Manual, the DOP Guide, and the BCS Informationals are written policies of the Employer affecting terms and conditions of employment within the meaning of Article VI, Section l(B) of the Agreement.

With respect to its first ground, the Union alleges specifically that the implementation and retroactive application of Informationals 18/83 and 12/84 violate certain procedures set forth in Article IV, Article VI and Article VIII, Sections II and III, of the HRA Manual.[2] These sections state, in pertinent part:

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[2] The Union also alleges violations of specific sections of the DOP Guide. Although the two manuals are not strictly parallel, the sections of the DOP Guide relied upon by the Union contain language substantially equivalent to the portions of the HRA Manual cited. Thus we find it unnecessary to quote from or to rely upon the DOP Guide.

Art. IV E .... Supervisors will rate the performance of their subordinates using Form M-303-a, Non-Managerial Employee Performance Evaluation ....

F. At the beginning of the evaluation period,[3] the supervisor completes Sections I and II of Form M-303-a by entering employee information, and the Master List Task Numbers, Tasks and Standards comprising the appropriate FACT.[4] At this time, the employee, the supervisor, and the reviewer ... all sign in the appropriate area of Section II....

Art. VI Is Master List Adequate? ... When one or more essential tasks needed to evaluate a particular Functional Title are not included on the List ... do not complete Column III [employee's performance compared to standards] for that Functional Title.

[5]

[3] Where underlining or capitalization is used herein, the emphasis is in the original.

[4] Section II of Form M-303-a includes two columns, one for the listing of Functionally Assigned Cluster of Tasks or FACT (job components on which the evaluation is based) in descending order of importance. There is a box for insertion of the Master List Task Number for each task. The second column in Section II is for the listing of the standards by which each task is to be evaluated.

[5] Article VIII gives instructions for the filling out of form M-303-a. Section II of Article VIII deals with filling out Section II of Form M-303-a, tasks and standards. Section III of Article VIII deals with filling out Section III of Form M-303-a, ratings.

Art. VIII Sec. II (Complete Section II [of Form M-303-a] at the beginning of the evaluation period) ... In a personal conference with the employee, the supervisor should review

> the specific tasks and standards on which the employee will be evaluated. The supervisor should elicit and answer any questions the employee may have in order to ensure that the employee understands clearly what is expected of him/her. Whenever the employee's assigned duties are such that the FACT for his/her Functional Title does not accurately apply, the supervisor must either bring the employee's assigned duties in line with the FACT or request [a change of] the employee's Functional Title ....

Art. VIII Sec. III

> Section III: (Complete Section III at the end of the evaluation period) Employee's Performance Compared to Standards. The supervisor comments on and cites specific examples of the employee's performance, ... These examples and comments should explain and justify the rating for each task, which is checked in the appropriate box [of Section III]. In the Ratings column the supervisor checks the box which accurately reflects the employee's performance of the task, using the following description of each rating to evaluate the employee's performance.

Article VIII, Section III goes on to list the ratings from which the supervisor can choose:. outstanding, Superior, Satisfactory, Conditional, Unsatisfactory, unsalable. None of the definitions refers to numerical standards. For example:

> Satisfactory: The employee, because of his/her own efforts, basically attained all of the standards. Or failure to attain standards was primarily due to external conditions beyond the employee's control (which interfered with

satisfactory performance of the task).

The Union contends that the implementation of the numerical standards established in the Informationals, and their retroactive application to employees in mid-evaluation year, violates the policies set forth in the above sections of the HRA Manual. Thus, according to SSEU, employees were evaluated on the basis of new standards of which they had not been apprised at the beginning of their evaluation periods, and to which they had no opportunity to attempt to conform their performance. Consequently, employees may have received lower ratings than they would have under the prior standards.

The Union's second contention is that the implementation of the Informationals is not consistent with procedural requirements set forth in Article V, Article VII and Article VIII, Section III, in that "the numerical standards imposed were not among those specified in the [Form] M-303-a and were not approved by OPS [office of Personnel Services] or assigned a master task number by it."

The Union's final argument is, in essence, that the standards promulgated in the BCS Informationals are inconsistent with those set forth in the HRA Manual. Specifically, the Union contends that the numerical standards implemented are not necessarily accurate measures of the employee's performance, and thus the implementation of the Informationals

violates Article VII and Article VIII, Section IV of the HRA Manual. These sections read, in pertinent part:

> Art. VII Standards. Performance standards are the criteria against which the results of a worker's task are evaluated .... [They] must be related to the specific tasks, measurable, attainable, and indicative of a satisfactory level of performance.
>
> Art. VIII Sec. IV (1) While the overall Rating should not be merely a mathematical average of the individual task ratings, it should show some definite relationship to them.... In assessing the general tendency of the individual task ratings, the following factors should be considered: The "make or break" nature of individual tasks. [Such a task is] one which must be performed satisfactorily in order for overall performance to be considered satisfactory ...; the relative importance of different tasks .... other factors [e.g.,] the extent to which the employee facilitates or disrupts the work of other employees in the unit .... Special projects, [e.g.,] unique or nonrecurring assignments ....

The Union contends that the City is relying almost exclusively on the numerical standards established by the Informationals, and that these standards do not comport with the HRA Manual because they do not give an adequate indication of an employee's performance as required by Article VII above where that performance may have been affected by factors outside the employee's control, and because inadequate consideration is given to non-numerical factors such

as those set forth in Article VIII above.

The City's Position

The City challenged arbitrability on several grounds, taking the position that Article V, Section l(A) of the Agreement states explicitly that the City has the right to establish and/or revise performance standards and that implementation of numerical standards promulgated in the Informationals is a management prerogative not subject to the grievance and arbitration procedure. The City further asserts that there is no indication in the DOP Guide or HRA Manual that the procedures described therein are intended to be exclusive, and the DOP Guide specifically provides that:

> [a]gencies may follow the system described in this guide or may devise other systems which meet the [statutory] criteria and purposes....

The City states that there is no allegation that any employee has actually been disciplined pursuant to Article V, Section l(B) of the Agreement, but only that new performance levels have been promulgated. Thus, the City argues, SSEU has not established a colorable relationship between the cited contractual provision and the action complained of.

Moreover, the City alleges that the Union's claim is so

vague as to preclude the City from making an informed response, in that it does not identify specifically the rule, regulation, amendment or interpretation allegedly violated. And finally, the City points out that the Board has previously held that an alleged violation of a definitinal section of an agreement does not, in and of itself, furnish the basis for a grievance.

Discussion

This Board has repeatedly held that in determining disputes concerning arbitrability, we must decide whether the parties are in any way obligated to arbitrate their controversies and if so, whether the dispute presented falls within the category of issues the parties have agreed to submit for arbitral resolution.[6] It is clear that the parties in the instant matter have agreed to arbitrate grievances, as defined in Article VI, Section l(B) of their Agreement. The question remaining is whether or not the BCS's actions fall within the categories defined above so as. to present an arbitrable claim.

[6] Decision Nos. B-2-69, B-18-74, B-1-76, B-15-79, B-11-81, B-3-82, B-28-82, B-22-83, B-5-84, B-27-84, B-13-85.

In view of the City's contention that its actions arc beyond the scope of the grievance procedure by virtue of the management rights provision contained in Article V, Section l(A) of the Agreement as well as in NYCCBL, it is well to establish at the outset that the Union is not challenging herein the City's right to establish and revise evaluation standards. Rather, the gravamen of the SSEU's grievance is that in implementing the revised standards, the BCS has failed to follow the evaluation procedures delineated in the HRA Manual. This Board has previously found, in Decision No. B-31-82, that the employee evaluation system set forth in the HRA Manual

> has the force and effect of, and stands as a written policy of the Agency. As stated in Article VI, Section l(B) of the Agreement, ... an alleged breach of written policy constitutes grievable matter .... Questions relating to procedure [delineated in the Manual] are grievable and subject to challenge by the Union ....[7]

Similarly, we find that the BCS Informationals complained of, inasmuch as they establish agency guidelines for evaluating employees, are statements of written policy within the meaning of Article VI, Section l(B) of the Agreement.

[7] See also B-3-83.

The City contends that, because there is no allegation that any employee has been disciplined as a result of the implementation of the new standards, the Union has failed to establish the necessary connection between Article V, Section l(B) and the alleged violation of HRA policy by implementation of the standards. The City does not deny, however, that it has used these standards in the evaluation of employees since on or about November 1983. These evaluations are, in and of themselves, action taken on the basis of the Informationals. The fact that no discipline has resulted yet is of no significance, for, by their very nature, evaluations form the basis for a variety of personnel decisions affecting the career of the employee -- decisions regarding wage increases, promotion, demotion, special projects, additional responsibilities. The effect of the evaluation is not necessarily immediate, but cumulative, and harm may only surface in the future. Thus, we fin d that there is an arguable basis for the Union's claim that the retroactive implementation of the Informationals affects terms and conditions of employment within the meaning of Article VI, Section l(B) of the Agreement.

With respect to the Union's allegation that the numerical standards issued by BCS are inconsistent with portions of

the HRA Manual, the Manual outlines a variety of non-numerical factors to be considered, while the BCS informationals assign ratings based on numerical considerations only. Thus, there is arguably a conflict between these documents, based on a misapplication or misinterpretation of guidelines enumerated in the HRA Manual. Therefore, the Union is entitled to an interpretation. Having so found, we need not consider the merits of the claimed inconsistency, as this is a matter more appropriate for resolution by the arbitrator.

With respect to the City's remaining argments in opposition to the request for arbitration, we continue to adhere to our previous holdings that an alleged violation of a definitional section of an agreement does not, in and of itself, furnish the basis for a grievance.[8] Nevertheless, we find that where specific sections of a written agency policy, herein the HRA Manual, are alleged to have been violated, misinterpreted or misapplied, the necessary elements of an arbitrable claim are present. Further, we note that in its answer to the City's petition, the Union specified the sections of the Manual alleged to have been violated, and so we conclude that the Union's claim is not impermissibly vague, as claimed by the City.

[8] See, e.g., Decision No. B-22-85.

The Union also alleges that the City has violated procedures for adopting evaluation standards set forth in the HRA Manual by implementing standards which were not approved by OPS or assigned a Master Task List Number. We find that there is a distinction between procedures which affect the rights and responsibilities of employees represented by the Union, such as the notice requirements discussed above, and internal management procedures which are intended to regulate the consideration and adoption of management polices. The substance of the procedures for notifying the employee of evaluation standards runs between the agency and the employee; the substance of procedures for adoption of standards runs between different levels of agency management. Because the procedures cited by SSEU in this regard do not relate to bargaining unit personnel, the Union may not grieve noncompliance.[9] In any case, we note that the City's very submission of the petition challenging arbitrability indicates that these standards have, in effect, been approved by the Agency.

For these reasons we deny the Union's request for arbiration insofar as it relates to the alleged failure to

[9] See Decision No. B-7-85.

follow internal procedures for the adoption of the new performance standards set forth in Informationals 18/83 and 12/84.

Having determined that the claims alleged by SSEU with respect to alleged violations of the procedures for the evaluation of employees set forth in the HRA Manual and the alleged misinterpretation or misapplication of evaluation standards set forth therein fall within the definition of a grievance contained in the collective bargaining agreement between the parties, we shall deny the petition contesting arbitrability and grant the request for arbitration of these two issues only. With respect to the alleged violation of procedures for adoption of evaluation standards, we deny the request and grant the petition.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted, only to the extent that the request for arbitration is based upon a claimed violation of the

HRA Manual insofar as it sets forth procedures for adcption of evaluation standards, and, in all other respects, it is denied; and it is further

ORDERED, that the SSEU's request for arbitration be, and the same hereby is, granted, only to the extent that it is based upon a claimed violation, misinterpretation or misapplication of the sections of the HRA Manual enumerated above which set forth evaluation procedures and evaluation standards; and, in all other respects, it is denied.

DATED: New York, N.Y.
December 6, 1985

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